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Come and see the Candy Made.APPEAL TO WASHINGTON
UPON JUDGES QUESTION

Attorneys for A. W. Carter Do Not Accept Territorial Supreme Court Decision—Several Important Cases Decided.

Attorneys for A. W. Carter, guardian, are going to carry the question of jurisdiction of circuit judges at chambers to the Supreme Court of the United States. They do not accept the construction of Hawaiian judiciary law as affected by the Organic Act which the Supreme Court pronounced yesterday in the Parker case, reported at some length below. Sidney M. Ballou, of counsel for the writ of prohibition that is dissolved, had a writ of error prepared before the day was over to carry the case to Washington.

Nobody had ever found anything wrong with the Hawaiian jurisprudence in its giving jurisdiction of probate and equity matters to judges at chambers. Other systems have probate judges apart from the ordinary law courts and some confer equity jurisdiction on particular judges who preside as well in courts of law. One advantage of the Hawaiian system is that it saves separate court machinery and expenses. However, in the course of a bitterly contested probate case, a circuit judge suggested and attorneys eagerly raised the point that the Act of Congress providing a government for the Territory of Hawaii abolished, at least by implication, all the old Hawaiian laws conferring equity and probate jurisdiction on circuit judges at chambers—that is out of regular court terms with juries in attendance—as well as recognizing such jurisdiction.

The Supreme Court of Hawaii finds the point not well taken and, as the construction of a Federal law is at issue, it is competent for the lawyers contending the contrary to appeal to the highest national tribunal. This they do and the Parker case will be hung up until the final word comes from Washington.

STATUS OF JUDGES.

Circuit Judges at chambers are decided by the Supreme Court to have independent jurisdiction in equity and probate matters, such independent jurisdiction being exercised by such judges as courts of record, and not privately or summarily—the phrase "circuit judge at chambers" being in such case merely a method of describing such courts.

Referring to the contention that the Organic Act impliedly repealed Hawaiian laws giving circuit judges at chambers equity and probate jurisdiction, the syllabus speaks as follows: "In construing a doubtful provision of an act other provisions, the act as a whole and its reason and spirit may be considered; also the circumstances under which it was adopted, the history which preceded it and the consequences of proposed constructions; weight may be given to long continued, unquestioned and contemporaneous construction; if the provision is borrowed, the construction placed upon it previously may be considered; repels by implication are not favored; expressio unius est exclusio alterius."

Chief Justice Frear writes the decision, with the concurrence of Justice Hatch and Circuit Judge De Bolt in place of Justice Hartwell. It is in the matter of the application of Alfred W. Carter, guardian of the property of Annie T. K. Parker, a minor, for a writ of prohibition against the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit, at chambers, and J. S. Low, next friend of Annie T. K. Parker, a minor, Ballou & Marx; Kinney, McManahan & Couper, and Robertson & Wilder for petitioner; J. A. Magoon and J. Lightfoot for respondents. The decision is that the permanent writ is denied and the temporary writ dissolved. In pursuance of this deliverance, Messrs. Magoon and Lightfoot at once filed a motion to set a day for hearing the Parker case on its merits before Judge Gear.

HISTORICAL SKETCH.

The following bit of history relative to courts in Hawaii is given in the body of the opinion:

"Much, as to jurisdiction and procedure, is governed by what may be considered Hawaiian common law—that has grown up without the aid of statute or has been built upon statutes by inference and been recognized by bench and bar and has to some extent been assumed in the enactment of statutes. In fact, the judiciary has developed here, especially in its earlier period, much as it did in early English history, gradually and largely without the aid of statute. There was a gradual separation of judicial from executive and legislative functions, a gradual organization of a judicial system, introduction of trial by jury, separation of law and equity, separation of civil and criminal matters at law, and of equity, probate and admiralty matters at chambers, and of the functions of the judge and the jury, and a gradual development in forms of pleading and practice. This began long before the first constitution, that of 1840, the provisions of which were somewhat crude and meager and but little suggestive of the system, especially so far as the superior courts of record—the governors' courts—were concerned, that then existed and rapidly developed for some years afterward."

"Prior to the constitution of 1840, there were scarcely any statutory provisions relative to the judiciary. After that until the act of 1847, organizing the judiciary, there was little

more than the act of 1842, which related chiefly to juries and began:

"There are two distinct kinds of courts. One kind where the judges or tax officers decide the case by themselves, and the other kind where they cannot act by themselves, but certain other persons must be associated with them. These persons who are associated with them shall constitute the jury."

"The first comprehensive act covering the judicial system with any degree of completeness was that of 1847. That is largely the basis, directly or indirectly, of all subsequent comprehensive acts relative to the jury. It divided jurisdiction between certain named courts and judges at chambers. Then came the constitution of 1852, which has been the basis of all subsequent constitutions. It provided in Article 81: 'The judicial power of the kingdom shall be vested in one Supreme Court and in such inferior courts as the Legislature may from time to time establish.' This was followed the next year by the second comprehensive judiciary act, drafted, we believe, by the same person who drafted the constitution, Chief Justice Lee. The main object of this act was to conform the laws to the change in the Supreme Court."

"The former Supreme Court, consisting of the king, premier and four chiefs, whose functions had practically ceased, was dropped altogether, and what had previously been the Superior Court of law and equity in name, but had already become practically the Supreme Court as well in reality, was made such in name also. This act also preserves the distinction between the courts and the judges at chambers, in matters of jurisdiction, methods of appeal, etc."

"Next came the Civil Code of 1859, embodying, in Sections 815-1252, a codification of the laws relating to the judiciary, namely, the acts of 1847 and 1852, and a number of subsequent acts of minor importance, but preserving the distinction between the courts and the judges at chambers in language for the most part still in force in the statute books."

"The constitution of 1864 followed, copying for the most part the provisions of that of 1852, including the provision now in question, which was Article 64 of that constitution. 'The constitution of 1867 was copied mostly from that of 1864, and contains the same Article 64. Meanwhile a number of more or less important acts were passed more fully defining or altering in detail the jurisdiction and procedure, that already for the most part existed, in regard to particular subjects. These are set forth in the compilations of 1884 and 1897, which were not enacted."

"The Judiciary Act of 1892 made some important changes in the organization of the judiciary and the jurisdiction of the courts, but preserved the same distinction between the courts and the judges at chambers."

"The constitution of 1894 copied the provisions of that of 1864 relating to the judiciary with some changes not material to the questions now under consideration. The provision now particularly in question appears as Article 92."

"In view of the fact," the court comments, "that constitution after constitution and statute after statute has been adopted by constitutional conventions and legislatures and accepted without question by bench and bar and the public throughout the sixty-four years of organized constitutional government in Hawaii, recognizing the constitutionality and propriety of provisions such as those now called in question, coupled with the fact that the 'judges at chambers' in the exercise of jurisdiction in equity and probate matters are and have been regarded as courts, and not only that but courts of record, it would be preposterous to hold that the statutes conferring or defining such jurisdiction of judges at chambers would be void under Hawaiian constitutions or immediately prior to the enactment of the Organic Act."

The court analyzes the provision of the Organic Act under which the jurisdiction of circuit judges at chambers is assailed, and finds that Congress did not intend to abrogate any of the Hawaiian judiciary laws by implication. This is shown by the fact that Congress retained of such laws what it intended to retain and abolished what it intended to abolish—no more and no less in either case.

SENTENCE UPHELD
IN WATANABE CASE

By unanimous decision of the Supreme Court, written by Justice Hartwell, exceptions of defendants are overruled in the case of Territory of Hawaii vs. Watanabe Masagi and Funa-koshi Tatsugoro and the case is remanded to the Fourth Circuit Court. M. F. Prosser, Deputy Attorney General, appeared for the prosecution in the appellate court, and Cathcart & Milverton and George A. Davis for the defendants. Following is the statement of the case made at the beginning of the court's opinion:

"The defendants were tried at the January term, 1902, of the Fourth Circuit Court held at Hilo, Island of Hawaii, Little J., presiding, upon an indictment charging them with the murder of one Motohiro Kitano, January 25, 1902. The indictment charged murder in the first degree. The jury rendered a verdict finding the defendants guilty

of murder in the second degree. The court sentenced the defendants, Funa-koshi Tatsugoro to imprisonment at hard labor for thirty years and the defendant Watanabe Masagi to imprisonment at hard labor for twenty-five years."

CUMMINS TRUSTEE
HELD RESPONSIBLE

Judge De Bolt's decision in the matter of the estate of Thomas Cummins, deceased, is set aside by unanimous opinion of the Supreme Court, constituted by Chief Justice Frear, Justice Hartwell and Circuit Judge Gear in place of Justice Hatch, disqualified. The opinion is written by Justice Hartwell. M. F. Prosser and R. W. Breckons appeared for the appellants, and Cecil Brown and Ballou & Marx for the appellee.

The decision of Judge De Bolt found that forty shares of stock in the Wailuku Sugar Co. were rightfully purchased by Thomas J. Cummins (son of the deceased named in the title of the case). This stock purchase was made by J. O. Carter, of Thomas J. Cummins in his lifetime the business agent and after his death the executor of his will.

Some new Wailuku stock had been issued, and shareholders at the time were privileged to obtain it, pro rata of their holdings, at par value. There was some stock belonging to the estate of Thomas Cummins, of which estate Bruce Cartwright was the trustee. Thos. J. Cummins had a life interest in the estate. Cartwright's business representative, while he was absent, delivered the order for the extra stock coming to the estate, being forty shares, to J. O. Carter, who thereupon obtained the stock from C. Brewer & Co. on payment of \$4000, the par value, and Carter sold it at an advance of \$50 a share, clearing \$2000 for the estate of Thomas J. Cummins.

Marla King and Elizabeth Fairchild, beneficiaries of the will of Thomas Cummins taking the estate after the death of their father, Thomas J. Cummins, appealed from the decision of Judge De Bolt.

The Supreme Court holds that a stockholder's right to purchase at par new shares issued by a corporation is not "income, profits or gain" of the shares held by him, but belongs to the principal as an incident of its ownership according to the remainderman and not to the life tenant or beneficiary. It also holds the trustee (Cartwright) responsible for the profit of \$2000 he allowed to go to the life beneficiary, "although he acted on legal advice and believing that the life beneficiary was entitled to the rights."

HAWAIIAN SUGAR CO.
LOSES TAX APPEAL

The appeal of the Hawaiian Sugar Co. against its assessment for taxation is lost, the Supreme Court by unanimous opinion affirming the decision of the tax appeal court. Circuit Judges De Bolt and Gear sat with Chief Justice Frear, writer of the opinion, in place of Justices Hartwell and Hatch, disqualified. Smith & Lewis and L. J. Warren appeared for appellant, and W. S. Fleming, Deputy Attorney General, for appellee.

It was an appeal from the tax appeal court, fourth division (Kauai and Niihau), sustaining, on appeal from the tax assessor, an assessment of \$400,000, made as of January 1, 1903, upon the lessors' interest in 3933 acres of cane land held by the appellant under a lease for fifty years, beginning January 1, 1889, the lessee being obliged by the terms of the lease to pay all taxes on the demised premises. The appellant relied on the rule of eight years' rental as the basis of taxation, "unless that would be manifestly unfair and unjust" as part of the rule goes. The rent of the land in question consists of percentages of the sugar produced on it, varying according to the amount of sugar produced, and for the previous five years had averaged in value \$42,500 a year. The court reviews the circumstances of the case and lays down the law thus:

"An assessment, made by the assessor and sustained by the tax appeal court of the lessors' interest in certain land at more than the amount of eight years' rental is affirmed under the circumstances set forth in the opinion."

SLEPT ON RIGHTS
WHEN COME OF AGE

The Supreme Court by unanimous decision sustains the exception to the refusal by Judge Robinson of defendants' motion for a directed verdict in the case of Becky I. K. Kalamake by her guardian, J. W. Kelki, vs. Henry Wharton and the Wailua Agricultural Co. A new trial is ordered.

Justice Hartwell writes the opinion. Judges De Bolt and Gear having sat with him on the hearing. J. A. Magoon and J. Lightfoot appeared for plaintiff; Castle & Withington and C. W. Ashford for defendants.

The gist of the decision is that the defendants had title by adverse possession; that the grantee of the entirety of an estate from a co-tenant is not regarded as holding a fiduciary relation to the other co-tenant, a child of four years at the date of the conveyance, merely because the child was brought up in the family of the grantee's mother, and that the statute of limitations had run against the plaintiff. The plaintiff did not bring the suit within five years after coming of age when the statutory limit of adverse possession had run.

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